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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial court is required to make an inquiry to determine that there is a factual basis for a defendant's plea to a criminal forfeiture charged in an indictment or information.

2. Whether a trial court is required to advise a defendant of the right to a jury trial on criminal forfeitures which are charged in an indictment or information.

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INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 8,700 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of the proper administration of criminal justice.

NACDL has long been troubled by the expanding use of civil and criminal forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are being used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

In its past three terms, this Court has accepted review of five forfeiture cases.[2] In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the gov-

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[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of the Supreme Court.

[2] *Republic National Bank v. United States*, 506 U.S. ___, 113 S.Ct. 554 (1992); *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. ___, 113 S.Ct. 1126 (1993); *Alexander v. United States*, 509 U.S. ___, 113 S.Ct. 2766 (1993); *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993); and *United States v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492 (1993).

ernment's increasingly aggressive use and abuse of the forfeiture weapon. This case provides the Court with yet another opportunity to ensure that there are meaningful checks on the government's ability to confiscate a defendant's property as punishment for a criminal offense. Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to reverse the decision below.[3]

SUMMARY OF ARGUMENT

Although the Federal Rules of Criminal Procedure require that a court satisfy itself that there is a factual basis for a plea of guilty, there is a conflict among the circuits on this issue of recurring importance as to whether Fed.R.Crim.P. 11(f) applies to criminal forfeitures listed in the indictment which are included as part of a plea agreement.[4]

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[3] As a result of this Court's rulings in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993), and *Department of Revenue of Montana v. Kurth Ranch, et al.*, 511 U.S. ___, 114 S.Ct. 1937 (1994), the government, in order to avoid double jeopardy violations, will likely pursue criminal forfeitures as part of a single prosecution instead of relying on separate civil forfeiture proceedings as it has in the past. *See, e.g., United States v. $405,089.23 U.S. Currency, et al.*, 33 F.3d 1210 (9th Cir. 1994), *rehearing denied*, 1995 WL 321826 (May 30, 1995). Consequently, the number of cases involving criminal forfeitures is likely to increase significantly.

[4] *Cf. United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985) and *United States v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986) (Rule 11(f) applies to forfeitures included as part of a plea agreement just as it applies to a guilty plea) with *United States v. Bachynsky*, 949 F.2d 722, 730 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 150 (1992) (The requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture) and *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992) (Because the forfeiture provision is "not a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea" Rule 11(f) only applies to the guilty plea). The Tenth Circuit in the case below rejected *Roberts* and *Reckmeyer* and agreed with *Boatner*. *United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994).

Since criminal forfeitures must be charged in the indictment or information, Fed.R.Crim.P. 7(c)(2), are entered as a judgment, and cannot be imposed in the absence of a conviction by special verdict, Fed.R.Crim.P. 31(e), or by a plea to the forfeiture count, the requirements of Rule 11(f) are applicable to criminal forfeitures by the terms of the rules.

The application of Rule 11(f) to forfeiture proceedings is also logical and a matter of good policy. Due to the government's direct pecuniary interest in the outcome of forfeiture proceedings, procedural safeguards are necessary to ensure that the forfeiture does not exceed what is allowed by statute because of prosecutorial overreaching or mistake. Moreover, in light of the severely restricted substantive rights of third parties claiming an interest in forfeited property in cases involving criminal forfeitures, procedural safeguards are necessary to protect innocent third parties' property rights from unnecessary infringement.

ARGUMENT

I. FEDERAL CRIMINAL RULE 11(f) REQUIRES THAT A COURT FIRST ASCERTAIN THAT THERE IS A FACTUAL AND LEGAL BASIS FOR THE FORFEITURE BEFORE ENTERING A JUDGMENT ON A PLEA TO A CRIMINAL FORFEITURE.

A. The plain language of Fed.R.Crim.P. 11(f) requires the court to satisfy itself that there is a factual basis for an agreed forfeiture.

Rule 11(f) provides as follows:

> **(f). Determining Accuracy of the Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The issue before the Court is whether the forfeiture of assets in a criminal prosecution pursuant to 21 U.S.C. §853 is a part of "the plea" as contemplated by Rule 11(f). The language of Rule 11(f) clearly reaches both components of a plea involving the criminal forfeiture of property: (1) the defendant's admission of guilt and (2) the defendant's concession that the property named in the indictment is subject to forfeiture.

As the Advisory Committee observed, an inquiry pursuant to Rule 11(f) should, among other things, "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the *charge* but without realizing that his conduct does not actually fall within the *charge*." 18 U.S.C. App., Notes of the Advisory Committee on Rules, 1966 Amendment (emphasis supplied). This Court has previously recognized that "forfeiture is a substantive charge in the indictment against a defendant." *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 2654 n.5 (1989). Moreover, this Court has recognized the important role that the factual basis inquiry plays in ensuring that pleas are knowing and voluntary. Thus, despite Rule 11's use of "should," and its seeming grant of broad discretion in the scope of the inquiry to be made, this Court in *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495 (1971), described the "factual basis" inquiry as mandatory. Indeed, given that *Santobello* reached the Court from a state court, it is apparent that this Court viewed that mandate as a requisite of constitutional due process. *See also North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160, 167 (1970); *McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969).

B. Procedural safeguards are necessary to ensure that the forfeiture does not exceed what is allowed by statute due to prosecutorial overreaching or simple mistake.

In *United States v. James Daniel Good Real Property*, *supra*, this Court acknowledged the extent of the government's financial stake in forfeiture. Because the government has a "direct pecuniary interest in the outcome of the proceeding," *id.* 114 S.Ct. at 502, there is a heightened risk of prosecutorial overreaching.[5] The Court has traditionally recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal conduct:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. *See United States Trust Co. of New York v. New Jersey*, 431 U.S.1, 25-26, 97 S.Ct. 1505 (1977); *Perry v. United States*, 294 U.S. 330, 350-351, 56 S.Ct. 432 (1935).

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[5] Petitioner Libretti's plea agreement contains an unusual provision earmarking *all* of the forfeited assets for the Criminal Investigations Division of the Wyoming Attorney General's Office. Consequently, the law enforcement agency which investigated the case will receive a large cash bounty for its efforts whereas the United States, which successfully prosecuted the case, will receive none of the forfeited assets. House Judiciary Committee Chairman Henry Hyde (R-Ill) documents the abuses to which this "earmarking" system has led in his new book, *Forfeiting Our Property Rights* (CATO, 1995).

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 2693, n.9 (1991) (Scalia, J., concurring).

Criminal forfeiture usually occurs in the context of drug, money laundering, or racketeering offenses carrying severe sentences. Therefore, prosecutors can exert tremendous pressure on defendants to agree to forfeit their property in exchange for concessions which reduce the anticipated prison sentence. That is what happened in the case at bar, and it is a common occurrence in our federal criminal justice system. Defendants are frequently persuaded to agree to forfeit all, or substantially all, of their assets as part of a plea bargain which allows them to avoid what would otherwise be a life sentence or an extremely long prison term. The government often insists that the defendant agree to forfeit untainted property not otherwise subject to forfeiture, as occurred in this case, on the theory that the untainted property is a "substitute asset" for tainted property the government is unable to seize. *See* 21 U.S.C. §853(p) and 18 U.S.C. § 1963(m).

Not surprisingly, the government's estimate of the total amount of property subject to forfeiture is frequently exaggerated. For example, the government often assumes (without any evidence to support the assumption) that in a drug trafficking conspiracy the drug trafficker sold the same amount of drugs every week for the entire duration of the conspiracy. Moreover, in assessing the amount of "proceeds" subject to forfeiture, the government does not allow for the costs incurred by the trafficker, in particular, the cost of the drugs sold.[6] Through such

[6] In our view, the term "proceeds" in 21 U.S.C. § 853(a)(1) and 18 U.S.C. § 1963(a)(3) refers to "net, not gross, revenues—profits, not sales, for only the former are gains." *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), *cert. denied*, 111 S.Ct. 2019 (1991). *Accord, United States v. Milicia*, 769 F.Supp. 877 (E.D.Pa. 1991) (pharmacist convicted of dispensing controlled substances illegally was allowed a deduction for wholesale cost of illegal prescriptions he filled — 60% of gross receipts — in calculating amount of proceeds subject to forfeiture under § 853(a)(1)); *United States v. Elliott*, 727 F.Supp. 1126 (N.D. Ill. 1989) (government conceded that purchase price of stock had to be deducted from sales price to calculate forfeitable proceeds from illegal stock transactions). *See also, United States v. 122,942 Shares of Common Stock*, 847 F.Supp. 105 (N.D.Ill. 1994) (construing term "proceeds" in 18 U.S.C. § 981(a)(1)(C) to encompass only the profit from fraudulent stock transaction, not all the property acquired as a result of the transaction).

In the case at bar, the government calculated petitioner's total drug "proceeds" at $1.5 million, apparently treating his gross revenue from drug trafficking as "proceeds" and allowing no deduction for the cost of the drugs sold by petitioner. However, all of petitioner's property was appraised at only $410,000. Moreover, some of petitioner's property was clearly purchased with legitimate income. For example, the government forfeited his 401(k) employee savings plan with General Chemical, his IRA accounts, and bank accounts in which petitioner deposited his General Chemical paychecks. Petitioner was employed by General Chemical Corp., Green River, Wyoming as a full-time accounting supervisor earning $40,000 to $50,000 per year from June 1, 1989 until his arrest on December 4, 1991. Petitioner's employment history prior to his job at General Chemical is described in the Presentence Report ¶¶ 36-37.

artificial calculations, the government can easily contrive a figure for drug proceeds garnered by the defendant which greatly exceeds the defendant's total assets. In the government's view, this "cocktail napkin" calculation justifies stripping a defendant of all of his or her property, no matter how or when acquired, because the amount of the forfeiture is less than the government's inflated estimate of the total amount of the defendant's drug "proceeds." The substitute assets provision, 21 U.S.C. § 853(p), is relied upon by the government to forfeit the defendant's untainted property as well as property whose source is not known.

Defendants who are faced with draconian prison sentences under the federal sentencing guidelines (U.S.S.G.) have no real choice but to take whatever "deal" is offered to them by the government, even if it includes forfeiture of *all* their property, including untainted property as well as tainted assets. Thus, it is essential for courts accepting a plea which includes a criminal

(or a related civil) forfeiture to inquire into the factual basis for the forfeiture. Unless such an inquiry is mandated, nothing prevents the government from using its naked, unchecked power to coerce a defendant's allegedly "voluntary" relinquishment of his property rights.[7] *See e.g., Guiffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994).[8]

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[7] In *United States v. Boatner, supra*, the Eleventh Circuit reasoned that because the forfeiture in that case represented "a bargained for exchange between the parties," Rule 11(f) did not require the judge to determine whether there was a factual basis for the defendant's agreement to a criminal forfeiture. The Tenth Circuit adopted that reasoning in this case. 38 F.2d at 528-29. This rationale is unpersuasive because of the vastly unequal bargaining power of the defendant in most cases. All plea agreements are bargained-for exchanges between the parties. That alone does not justify dispensing with any factual inquiry into the basis for the guilty plea. It likewise cannot justify dispensing with a factual inquiry into the basis for the agreed forfeiture. The plea inquiry is designed to protect the defendant against prosecutorial overreaching and to ensure that the defendant's plea is knowing, intelligent and voluntary. 18 U.S.C. App., Notes of the Advisory Committee on Rules, 1966 Amendment. Those concerns are equally valid — perhaps even more so, in light of the government's direct pecuniary interest — with respect to criminal forfeiture.

[8] James Guiffre was arrested on May 10, 1990 in Somerset County, New Jersey and threatened with felony drug charges carrying 10 years in prison and forfeiture of his residence unless he cooperated in an ongoing investigation and signed over deeds to two building lots he had bought in 1988 for $174,000. Within 24 hours of his arrest, and after having been repeatedly refused an opportunity to consult an attorney, Guiffre signed over the deeds to the two lots for $1. Pursuant to the unwritten agreement between Guiffre, the prosecutor (Bissell) and the chief of detectives for the County Prosecutor's Office (Thornburgh), all charges against Guiffre were ultimately dismissed.

In a subsequent civil rights action, Guiffre alleged that he had made it clear to Chief Thornburgh that "not one cent of illegal money [was] used to buy those lots." 31 F.3d at 1249. Guiffre also alleged that Chief Thornburgh threatened that if he refused to take the deal being offered to him his home and the building lots would be forfeited; his fiancee would be put out of the house they shared and possibly face criminal charges herself; he would "rot

C. Procedural safeguards are necessary to protect third parties' property rights from unnecessary infringement.

Another important reason why a court should be required to find that there is a factual basis for an agreed criminal forfeiture is to protect the rights of innocent third parties. If the court accepts a guilty plea which includes property forfeitures, and enters a judgment of forfeiture at sentencing, that judgment profoundly impairs the property rights of any third party who has an interest in the forfeited assets.[9] Although the federal criminal forfeiture statutes provide a procedure whereby certain third parties are allowed to appear and request that the court adjudicate their claims to the forfeited property, a third party's rights are severely limited under these statutes. 21 U.S.C. §853(n); 18 U.S.C. §1963(1).

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in jail for a year" before going to trial, and he would lose his professional licenses. Chief Thornburgh allegedly gave Guiffre an hour to make up his mind and forbad him from speaking first with an attorney. *Id.* At the direction of Chief Thornburgh, Guiffre signed a statement averring that the two building lots were purchased *in part* with illegal drug money. *Id.* at 1244, 1249.

Guiffre also alleged that, in July 1990, Prosecutor Bissell told him he would have the first opportunity to buy back his building lots, but his offer of $100,000 cash for the lots was later rejected by Bissell as insufficient. Each lot was later sold at a public sale for only $10,000. They were subsequently transferred to two individuals with alleged ties to the Prosecutor's Office. *Id.* at 1252.

Somerset County, N.J. ranks *thirteenth* in population in that state but *first* in assets seized for forfeiture. Rep. Henry Hyde, *Forfeiting Our Property Rights*, CATO (1995) at 36. Prosecutor Nicholas Bissell, Jr., who controls the forfeited money, placed $300,000 from the county forfeiture fund in a small bank (with deposits of $1.8 million) owned by Bissell's longtime business associate. Bissell spent $6,000 from the fund to buy private tennis club memberships for his assistant prosecutors and police detectives. *Id.* at 36.

[9] By contrast, a defendant's guilty plea does not implicate any third party's rights.

In order to prevail in a criminal forfeiture proceeding, a third party petitioner must establish by a preponderance of the evidence that (1) the petitioner has a legal right, title or interest in the property which renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture; or (2) petitioner is a bona fide purchaser for value of the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture. 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(l)(6).

Not content with narrowly restricting the substantive rights of third parties claiming an interest in forfeited property in cases involving criminal forfeitures, Congress, at the urging of the government, also placed the burden of proof on the third party, and denied third parties the right to a jury trial.[10] Thus, a third party claiming an interest in property that has been criminally forfeited as a result of another person's crime is at a significant disadvantage vis-a-vis the government and enjoys even *fewer* rights than the accused or than a claimant in a civil forfeiture proceeding under the customs laws.

Congress narrowly restricted third party rights in the so-called ancillary hearing on the assumption that a judgment of criminal forfeiture entered against the criminal defendant is a highly reliable determination that the property is in fact subject to criminal forfeiture. *See* S. Rep. No. 98-225, 98th Cong., 2d

[10] Despite the fact that the third party provisions were enacted in 1984, there is still a complete absence of caselaw discussing the constitutionality of placing the burden of proof on the third party and the denial of a right to trial by jury. Prior to 1984, third parties claiming an interest in forfeited property could only petition the Attorney General for relief by way of remission — a scheme that obviously violated their due process rights. *See, United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1190 (D.C. Cir. 1995).

Sess. 209, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3392 ("Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party."). That underlying premise may be valid when, after a trial, the elements of forfeiture are found beyond a reasonable doubt by the trier of fact.[11] However, the premise cannot be valid where the defendant agrees to forfeiture as part of a plea agreement unless the court is required to find a substantial factual basis for the forfeiture.

A defendant may readily agree to the forfeiture of property he or she never owned. Unless the court inquires into the facts, it may unknowingly enter a judgment of forfeiture which unfairly impairs or destroys the rights of the true owner of the property. Why should a defendant care about such property? Moreover, the criminal forfeiture statutes explicitly reach otherwise forfeitable property that has been transferred to a third party prior to the indictment. The criminal defendant may have little or no interest in preventing the forfeiture of property which has been transferred to a third party. *United States v. De Ortiz*, 910 F.2d 376, 384 (7th Cir. 1990) ("a defendant will have no incentive to avoid agreeing to the forfeiture of assets which he or she has already transferred to a third party."); *United States v. Schwimmer*, 968 F.2d 1570, 1580-81 (2d Cir. 1992).

[11] Even then, however, Congress ignored the fact that many criminal defendants will simply have no interest in contesting the forfeiture of property they never owned or have transferred to third parties, or will not be effectively represented with respect to forfeiture issues.

It is worth noting that most of the lower courts have erroneously held that the government need only prove its case for forfeiture under 21 U.S.C. ¶ 853 by a preponderance of the evidence, despite clear indications in the legislative history that Congress intended the burden of proof to remain beyond a reasonable doubt, as under the RICO criminal forfeiture provisions. *See United States v. Elgersma*, 929 F.2d 1538 (11th Cir.), *rev'd*, 971 F.2d 690 (11th Cir. 1992) (en banc); 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.03 (1995).

Even if the defendant *is* the current owner of the forfeited property, the forfeiture to which the defendant agrees may severely affect innocent third parties. In the *BCCI* case, for example, BCCI-related corporate entities under the control of court-appointed receivers agreed, pursuant to a plea agreement, to criminal forfeiture of all $552 million of their assets in the United States. That plea agreement forced all of BCCI's numerous foreign general creditors to petition the district court for relief from the forfeiture. To date, over a hundred petitions to amend the orders of forfeiture have been filed from all over the world. The district court has dismissed all or virtually all the petitions on standing and other grounds. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F.Supp. 32, 35 n.6 (D.D.C. 1993), *aff'd*, 46 F.3d 1185 (D.C. Cir. 1995).

In the case before the Court, several third party claims were made to the forfeited property. The district court's disposition of these claims illustrates how third party property rights may be infringed or destroyed by improvident forfeiture pleas. For example, Claudia Porter petitioned the court for the return of a diamond engagement ring she received from Libretti in 1990. The trial court held (J.A. 306) that the ring had been purchased with legitimate funds and that Ms. Porter was an innocent owner entitled to the return of the ring.[12] Because the court did not inquire into whether there was a factual basis for the forfeiture of the ring at the time it accepted Libretti's plea, Ms. Porter was forced to enter the case as a third party petitioner to defend her property right in the ring.

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[12] Notwithstanding the trial court's ruling, because Ms. Porter received the ring as a gift (not as a bona fide purchaser for value) *after* petitioner's offense had begun, Ms. Porter was not eligible for relief pursuant to 21 U.S.C. §853(n)(6). In other words, Libretti's plea agreement, as interpreted by the government and the Tenth Circuit, extinguished Ms. Porter's property rights in her engagement ring even though the ring did not belong to petitioner at the time of the plea agreement and even though it was purchased with untainted funds!

Petitioner's brief also demonstrates how the property rights of petitioner's parents, Dr. and Mrs. Libretti, were adversely affected by the plea agreement. According to the government's theory, when Libretti agreed to forfeiture as part of his plea bargain, the government was not required to make any factual showing whatsoever, at any time, before shifting the burden of proof to any third party owners. Thus, because Libretti had "agreed" to the forfeiture of assets owned by his parents, Dr. and Mrs. Libretti were forced to become parties to the forfeiture proceeding, at considerable expense and inconvenience, in order to prevent the forfeiture of property in which they had a legitimate interest and which was clearly outside the scope of Libretti's alleged (and admitted) criminal activity. Libretti's plea agreement, as interpreted by the government and the Tenth Circuit, deprived Dr. and Mrs. Libretti of the right to a jury trial in the third party proceeding, and further required them to carry the burden in the third party proceeding of proving that their property was not subject to forfeiture.

D. Rule 11(f) should apply to a criminal forfeiture plea because a defendant has a right to trial by jury on the issue of forfeiture.

The courts which have held that the trial court is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture have reasoned that, because forfeiture is not a substantive charge but rather a sanction to which the parties agree, Rule 11(f) does not apply. However, it is irrelevant for present purposes whether forfeiture is conceived of as a charge in the indictment, *Caplin & Drysdale, Chartered v. United States*, *supra*, 109 S.Ct. at 2654 n.5 (1989) ("forfeiture is a substantive charge in the indictment"), an element of the offense, Rule 31(e) and Advisory Committee Notes ("the amount of the interest or property subject to criminal forfeiture is an element of the offense"), or as a sanction (*e.g.*, *United States v. Boatner*, *supra*).

What is crucial here is that the defendant has a statutory right (and, we submit, a constitutional right) to a jury trial on the issue of forfeiture. Rule 31(e), Fed.R.Crim.P.; *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984) (defendant has Sixth Amendment right to jury trial on issue of whether an asset may be forfeited under 21 U.S.C. § 848), *aff'd on other grounds*, 471 U.S. 773 (1985). *See also Honda Motor Corp. v. Oberg*, 114 S.Ct. 2331 (1994) (where a person has been deprived of liberty or property without the safeguards of a common law procedure which would have provided protection against arbitrary and inaccurate adjudication, "this Court has not hesitated to find the proceedings violative of Due Process.").[13]

"[A] defendant's waiver of his statutory right to have a jury determine which portion of his property is subject to forfeiture is only valid if knowingly and voluntarily made." *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993). The defendant's waiver cannot be *knowing and intelligent* unless there is a factual basis for believing that the property is subject to forfeiture. *See United States v. Roberts*, 749 F.2d 404, 410 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985). As petitioner argues in his brief, the requirement that there be a factual basis for a guilty plea to a forfeiture charge is "a necessary correlative to the procedural protections for criminal forfeiture afforded in Rule 7(c)(2) and Rule 31(e)" of the Rules of Criminal Procedure.

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[13] Congress viewed the RICO statute and 21 U.S.C. § 848 "as reestablishing a limited common law criminal forfeiture. Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." Fed.R.Crim.P. 7(c)(2) Advisory Committee notes (1972 amendment).

II. A PROFFER EXPLAINING WHY EACH ITEM OF PROPERTY IS SUBJECT TO FORFEITURE, AND PROVIDING A BRIEF STATEMENT OF THE FACTS SUPPORTING FORFEITURE, SHOULD BE DEEMED ADEQUATE TO ESTABLISH A FACTUAL BASIS FOR THE FORFEITURE.

It should not be enough for a defendant to merely *stipulate* that each property item is subject to forfeiture, because that would provide no real protection against prosecutorial overreaching. As discussed above, a defendant may readily stipulate to the forfeiture of property he doesn't own, thereby unfairly impairing third party rights. A defendant may also stipulate to the forfeiture of his own property, regardless of whether it is forfeitable, in order to take advantage of a plea agreement that will result in a lesser sentence. "The mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so; the trial court must ascertain whether it [is subject to forfeiture under the statute.]" *United States v. Roberts*, *supra*, 749 F.2d at 409. *Accord United States v. Reckmeyer*, 786 F.2d 1216. 1222 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986). *But see United States v. Boatner, supra.*

On the other hand, if the government is required to provide too detailed a proffer of evidence to support forfeiture, this could impose an unwarranted burden on the prosecutor and the court. Thus, a reasonable balance needs to be struck.

The factual proffer should explain why each item of property is subject to forfeiture, and provide a brief statement of the facts supporting forfeiture under that theory. In the case of facilitating property under § 853(a)(2), the proffer should succinctly set forth how and when each asset facilitated the underlying drug offense(s). For example: "On January 1, 1992, the defendant's Ford pick-up truck was used to transport a bale of marijuana from the stash house on his farm to the parking lot

behind the 7-11 store on Main Street, Anytown, where it was sold to John Doe."

In the case of drug proceeds subject to forfeiture under § 853(a)(1), it is normally not feasible to establish the factual basis as precisely as with facilitation property. The government typically relies upon the statutory presumption in § 853(d) to establish that the property is drug proceeds. In such case, the government should proffer the essential facts upon which it relies to trigger the § 853(d) presumption. That is, the proffer should state approximately when the property was acquired by the defendant, that the acquisition was during the period of the violation or within a reasonable time after such period, and that there was no likely source for such property other than the drug violation. 21 U.S.C. § 853(d). If the defendant had no other substantial source of income during the relevant period of time, it is easy to so state. If the defendant did have another substantial source of income — as in this case — the proffer should explain the government's basis for believing that the particular assets sought to be forfeited were acquired with drug income.

Similarly, if the government's theory is that the property should be forfeited as "substitute assets" under § 853(p), the factual proffer should state the basis upon which the substitute assets provision is invoked, *e.g.*, how, as a result of an act or omission of the defendant, otherwise forfeitable property "cannot be located upon the exercise of due diligence" (§ 853(p)(1)) or "has been transferred or sold to, or deposited with, a third party" (§ 853(p)(2)). It should also explain how the government valued the otherwise forfeitable property and the substitute assets that are to be forfeited in lieu of the tainted but unavailable property. *See United States v. Roberson*, 897 F.2d 1092, 1097-98 (11th Cir. 1990).

Requiring the government to prepare such a statement of the facts supporting the agreed upon forfeiture would not be unduly burdensome even in cases such as this one where numer-

ous discrete items of property were forfeited.[14] The exercise of preparing such a statement for scrutiny by the court will force the prosecutor and the court to think about whether *all* of the property being confiscated is *actually subject* to criminal forfeiture. To the extent that this process prevents the initial forfeiture of property belonging to third parties, it will promote fairness and may conserve scarce judicial resources by obviating the need for a later ancillary hearing on third party claims.

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[14] In the typical case where the drug defendant has insignificant legitimate income, it will be very easy for the government to show an adequate factual basis for the forfeitures. *See, e.g., United States v. Reckmeyer*, 786 F.2d at 1222 (holding that Rule 11 proceeding established a sufficient factual basis for the forfeiture of the 41 items specified in the indictment and included in the plea agreement based on value of forfeited assets and Reckmeyer's insignificant legitimate income from 1974 through January 1975).

CONCLUSION

For the foregoing reasons, NACDL as amicus curiae respectfully urges this Court to reverse the decision of the Tenth Circuit Court of Appeals, and to hold that Fed.R.Crim.P. 11(f) requires a trial court to ascertain that there is a legal and factual basis for the forfeiture before entering a judgment on a plea to a criminal forfeiture as charged in an indictment or information.

Respectfully submitted,

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